IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.974 OF 1994.

Mahadeo Nivruti Chivate : Appellant.

versus

Smt.Sulochana Vasant Pawar

and ors. : Respondents.

Mr.M.S.Tapkir i/by Mr.A.V.Bukhari for the appellant.

Mr.A.H.Fatangare i/by K.S.Bapat for the respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 24th January 2005.

ORAL ORDER.

1. Heard advocates for the appellant and the respondents. The respondents had filed a claim petition for compensation under the Workmen's Compensation Act. The respondents are the legal representatives of deceased Vasant Maruti Pawar

who died in an accident on 15th November 1988 at Savalaj while he was doing the work of the appellant. The appellant, at that relevant time, was constructing a building in his firm. Deceased Vasant was employed for plastering the said building and while he was doing the said work he fell on the ground and sustained grievous injuries and died.

2. It was the case of the respondents/claimants that he was getting daily wages of Rs.50; he was a man of 45 years of age at the time of his death and, therefore, they claimed Rs.1,01,664/-. The Commissioner for Workmen’s Compensation, Sangli partly allowed the claim to the extent of Rs.70,216/- and, it is against this order the present appeal has been filed.

3. The counsel for the appellant contended that deceased Vasant did not come under the definition of workman as given in the Workmen’s Compensation Act, 1923 [herein after referred to as "The Act"] because his employment was of a casual nature and deceased Vasant was not employed for the purposes of trade or business of

the appellant, because the appellant was cloth merchant.

. Secondly it was contended by the advocate for the appellant that if at all the legal representatives of the deceased Vasant wanted to prove that deceased Vasant was the workman, as per **Schedule II Entry (viii)** deceased Vasant was not employed in the construction of any building which was designed to be or was or had been more than one storey in height above the ground or twelve feet or more from the ground level to the apex of the roof. He, therefore, contended that the initial burden laid upon the claimants to prove the height of the construction. There were no pleadings about the height and no evidence in that regard was there. The findings of the Commissioner that the fact was within the special knowledge of the appellant were wrong.

. The counsel for the appellant also relied upon three judgment reported in :- **1967 II LLJ (: 95 (Cal.H.C.) [Gopal Das Nandy vs. Alladi Bibee; AIR 1961 M.P.349 [Subhadrabai Sukhram vs. Malwa United Mills]; and 1992 II CLR 998 (MP) [Mahendra Kumar vs. Moolchand]**. The first

judgment is of Calcutta High Court; the second and third judgments are of Madhya Pradesh High Court. The Calcutta High Court, when faced with the similar situation, has considered unreported judgment in Appeal from Original Order No.39 of 1947. In that case the petitioner was a mason who was employed by the respondent in the work of constructing a latrine in a three storeyed building. During his employment he suffered injury and then he filed claim for compensation. In the said unreported judgment the learned Chief Justice held as under :-

> "It is conceded that the appellant was not regularly employed by the respondent. His work was undoubtedly of a casual nature. The respondent was the owner of the property upon which the appellant was executing either a small addition or a repair and it was whilst doing such work that the accident occurred."

Considering the facts of the case it was further held by the learned Chief Justice in that case that, "casual works who are employed otherwise than for the purpose of the employer’s trade or

business cannot be regarded as workmen." Applying that ratio the Calcutta High Court held in the case before it that the deceased's work was of casual nature and he was not employed for the purpose of the employer's trade or business.

4. This judgment squarely applies to the present case. Because constructing a house or a gotha was not the business of the appellant and, therefore, deceased Vasant was a casual worker not connected with the trade or business of the appellant.

5. In the second judgment of Madhya Pradesh High Court it has been held that, since the height of a building could be found out by measurement by any person, the burden is on the applicant for compensation to show that the building was above the prescribed height. I have no hesitation to follow this judgment because, as rightly observed, the height of the building could be measured by anybody and it could not be said that it was the matter within the special knowledge of the employer.

6. In the third judgment of Madhya Pradesh

High Court the same issue was there i.e. the effect of absence of pleadings and proof.

7. In the instant case before me also there are no pleadings of the claimants that house or building of the appellant was more than 12 ft. nor there is any evidence. Therefore, this is a case where claimants are trying to get benefit of the Act without making any pleadings which are necessary for bringing the case within the four corner of the law.

8. The counsel for the respondent, on the other hand, contended and urged that the Act was a social legislation for the benefit of the workmen and it should be interpreted liberally and, two views are possible. The view which is favouring the workman should be adopted. There cannot be any quarrel about this preposition. But the fact remains that the definition of workmen has been given so also the schedule. Therefore, if a person intends to claim under the said Act, then he has to satisfy the basic requirements.

9. So far as the facts are concerned, the

burden will be on the claimants to prove the facts and, if the facts are not proved obviously the case cannot come under the Act.

10. The counsel for the respondent also urged that if the appellant was constructing the gotha i.e. stable for cattle, then agricultural, being the business of the appellant, gotha was not for commercial purpose and, therefore, the appellant could not get any benefit under the Act or Exemption. It is difficult to accept this contention. There is nothing on record to show that agriculture was the business of the appellant and that Gota was being constructed for commercial purpose. I do not find any merit in the contention and objection raised by the respondent. The appeal is required to be allowed.

11. However, looking to the facts and circumstances, the advocate for the appellant, when questioned, conceded that he has no objection if exgratia payment of Rs.15,000/- to be awarded to the claimants including the compensation that might have been already given or paid to the legal representatives of the

claimant. Hence the following order :-

:ORDER:

. Appeal is allowed.

. Impugned order is set aside. The claim of the claimant for compensation is dismissed. However, the undertaking of the appellant that he will pay Rs.15,000/- in all as the exgratia payment to the claimant is taken on record. This will be inclusive of whatever exgratia payments has been paid by the employer to the claimants. Remaining amount shall be paid by the appellant within four weeks from today.

[D.G.DESHPANDE]

24/01/2005 JUDGE.